No. 14739

United States Court of Appeals
For the Ninth Circuit

ROLLAND LINDSEY, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF ALASKA, FIRST DIVISION

REPLY BRIEF OF APPELLANT

PHILIP W. SCHOEL,
930 1411-4th Avenue Building,
Seattle 1, Washington,
Attorney for Appellant.

MAX R. NICOLAI,
400 New World Life Building,
Seattle 4, Washington,
Of Counsel.

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Appellee candidly admits: (Br. 52) ". . . Without the medical testimony of Doctors Anderson and Stagg, the case would have been nothing more than Loretta's word against appellant's." Dr. Stagg merely testified that an examination of the vagina of the prosecutrix disclosed habituation to sexual intercourse. This testimony is uncontradicted, but it does, of course, not prove appellant's guilt. Dr. Anderson, the only practicing psychiatrist in the Territory of Alaska (R. 374) over objection was allowed to testify that a sodium pentothal test is highly reliable as a truth-eliciting device (R. 377); that it would force the prosecutrix to tell the truth (R. 382, 402); that the prosecutrix told a true story during the sodium pentothal interview (R. 400); and that she could not have made up her narration of the appellant's conduct with her (Br. 401).

In the opening brief appellant challenged appellee to produce any legal or medical authorities substantiating Dr. Anderson's opinion of the efficacy of sodium pentothal as a "truth serum." *It will be noted that ap-*

[*Italics, wherever used in this brief, are ours. References Br. refer to appellee's brief.*]

pellee has failed to produce a single medical or legal authority substantiating Dr. Anderson's view.

If instead of administering sodium pentothal to the prosecutrix, the psychiatrist had given her a few shots of bourbon sufficient to remove her inhibitions, it seems scarcely plausible that this court would sanction the admission of her testimony on the theory that she was bound to tell the truth while under the influence of alcohol. Lest this court feel that appellant's remarks are frivolous or facetious, we hasten to state that since the service of appellee's brief, there appeared an article in the July-August issue of the Journal of Criminal Law, Criminology and Police Science (Vol. 46, No. 2, 1955) "Truth Serum" by a well-known psychiatrist, John M. MacDonald, in which the learned author states (p. 259):

> ". . . The intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject's speech may be no more reliable. The drugged person may be just as boastful and *untruthful* as the alcoholic . . ."
>
> (p. 263) ". . . *As a test of truth, drug-induced examinations are unreliable* and should not be used for the purpose of exonerating the innocent . . ."

—and may we add by the same token, they should not be used for the purpose of rehabilitating impeached witneses. Since the whole article demonstrates the unreliability of a sodium pentothal interview we have taken the liberty of reprinting it in full as the appendix (Appendix A).

Athough having been completely impeached by the

retraction made under oath and the admittedly false accusation of rape against the federal marshal, Dr. Anderson's testimony concerning the value of sodium pentotahal as a truth-eliciting device,—though his opinion is at variance with the consensus of scientific opinion of his profession in the rest of the United States—we contend influenced the jury in believing that the prosecutrix was telling the truth.

Having read the cases cited and discussed by appellee, we submit that there is not one single case cited in which a psychiatrist has ever been permitted to render an opinion directly on the issue of the truth or falsity of a particular story of a witness, nor did we observe a decision where any court has ever sanctioned the playing to the jury of a verbatim recording of an interview of a psychiatrist and witness while the latter was under the influence of sodium pentothal. While psychiatrists are trained to observe insanity and various mental aberrations, they have no better facilities in finding out when normal people lie, than a court or a jury. All of us know of course that "normal" people do lie. If it is true that the prosecutrix in the instant case was neither neurotic nor a psychopathic personality, this court should not permit a pseudo-scientific opinion to sway the jury's mind. If the court will read the testimony elicited during the sodium pentothal interview, it can not fail to be impressed by the lack of scientific effort of Dr. Anderson. Dr. Anderson repeatedly stated that the prosecutrix could not have fabricated a story with such enormous detail of intimate knowledge of sexual matters. If we accept this premise, it would seem clear that a scientist would try to discover from whom and

with whom she acquired this knowledge. Yet, the interview discloses that not once did the doctor ask her about sexual relations with other men.

In his argument pertaining to the admissibility of Dr. Anderson's opinion and of the sodium pentothal interview, appellee relies principally upon three decisions:

People v. Jones, 266 P.(2d) 38;

U.S. v. Hiss, 88 F. Supp. 599; and the dissenting opinion in

People v. Ford, 107 N.E.(2d) 595.

It should be noted that in none of these cases was there even a discussion of the admission of a verbatim interview between a psychiatrist and a witness.

In the *Jones* case, *supra,* the Supreme Court of California granted the defendant a new trial because the trial court had refused to permit a psychiatrist to testify that the defendant was not a sexual deviate. The ruling of the California court can be understood only in the light of a California statute requiring expert testimony to determine whether a sex criminal is or is not a sexual deviate (p. 42). Furthermore in the opinion the court was careful to point out that the appellant in that case had not offered in testimony the answers given by him while under the influence of sodium pentothal. The court makes it clear that it would not have sanctioned the use of the answers given while under the influence of sodium pentothal (p. 43):

> "Here, the proffered evidence was not the answers of Jones to certain questions, but the interrogator's expert analysis of those answers for the

> purpose of determining whether Jones was a sexual deviate, that is, a sexual psychopath. The inference that Jones did not commit the offenses charged was to be drawn, if at all, from the psychiatrist's opinion in regard to the sexual propensities of Jones *and not from any answers given to him while under the influence of the drug . . .*"

The decision in the *Hiss* case, *supra,* likewise doesn't support appellee's contention here. In that case the trial court merely permitted a psychiatrist to render an opinion from his observations in court as to whether or not a witness was insane or mentally deranged. Sodium pentothal was not involved at all.

The dissenting opinion in the case of *People v. Ford, supra,* likewise does not support appellee's contention. The issue in that case was whether a psychiatrist could render an opinion as to the defendant's mental derangement which was partially based upon a sodium pentothal interview. The majority by its decision (no opinion of majority reported) makes it clear that the lower court had not erred in excluding testimony partially based upon the sodium pentothal interview. The dissenting judge was careful to point out that it would not have sanctioned the psychiatrist rendering an opinion on the ultimate issue in the case, *i.e,* the guilt or innocence of the defendant. In the instant case the central issue was, of course, the truth or falsity of the accusations of the prosecutrix, and the vice of the trial court's ruling consists in the fact that it permitted Dr. Anderson to render his opinion concerning this central issue.

Appellee repeatedly cites Wigmore to buttress his position with reference to the admissibility of the psy-

chiatrist's opinion as to the truth of the story related by the prosecutrix and the admissibility of the verbatim recording of the sodium pentothal interview (Br. 18, 28, Appendix D, p. 28, 30, 33). Appellee thus tries to give the impression that this well-regarded author would have approved the rulings of the trial court in the instant case. Nothing could be further from the truth. If this court will check the references of appellee, it will find that the author was appalled by the fact that many innocent defendants had been the victims of false charges by psychopathic females in sex cases, and he therefore recommended psychiatric examinations of such females (III Wigmore on Evidence, § 924 at pp. 459-466). With reference to "truth serum" this author is careful to reserve his opinion as to its validity (III Wigmore on Evidence § 997, 998, pp. 639, 641, 642).

The court will note that appellee's arguments with reference to the admission of the sodium pentothal interview are completely inconsistent. At times appellant is careful to stress that this testimony was restricted merely to rehabilitate an impeached witness; *i.e.,* its truth value as substantive evidence would thus be rendered immaterial (Br. 16, 23, 24). However, in order to justify its admission as a prior consistent statement, appellee argues that the truth value of this testimony is guaranteed (Br. 27, 32). Instruction No. 8-A which is challenged displays the same inconsistency. In one portion of the instruction the court tells the jury that this testimony is not substantive evidence of the fact that the defendant committed the crimes with which he has been charged (R. 463) and in another portion the

of the instruction he advises the jury to accept the statements made by the prosecutrix while under the influence of sodium pentothal only if the drug made lying impossible or highly improbable (R. 462). Likewise in his final argument the United States District Attorney left no doubt that this testimony discovered "the truth" (R. 476, 518).

Appellee seeks to justify admission of this testimony on the ground that the witness had been charged with recent fabrication. When we read the interview, however, we find that Dr. Anderson was employed to destroy the effect of the written statement of the witness, which she gave under oath. Of course even a proper prior consistent statement would not have been admissible to overcome that type of impeachment.

It seems clear that at the time of the interview with the psychiatrist the witness had the same motive that she had previously had for leveling accusations against her father; *i.e.,* vengeance for alleged ill-treatment, and a desire to get away from parental control. In addition the witness then had the additional motive of fear that she might be charged with perjury, if she did not stick to her original story. These are sufficient reasons to render the interview incompetent as a prior consistent statement. When, in addition, it is shown that the test is unreliable, it is clear that the admission of this testimony cannot be supported by any legal theory.

On the issue of corroboration, appellee argues that most common law jurisdictions do not require it, if the evidence of the prosecutrix is clear and convincing (Br. 36, 37). Appellant agrees with this rule, but wishes

to point out that because of the impeachment of the prosecutrix corroboration should be required in the instant case. Appellee argues that the case of *People v. Burns,* 4 N.E.(2d) 26 (Ill. 1936, Br. 36), bears a striking similarity to the case at bar. A reading of the case shows that the testimony of the prosecutrix was corroborated by her brother who saw the defendant with the prosecutrix near the park where the crime was committed and in addition the father of the prosecutrix subsequently caught the defendant in the act of taking indecent liberties with his daughter. Such corroborative testimony is of course absent in this case.

Appellee argues that the trial court did not commit reversible error in restricting testimony of hostility between defendant and prosecutrix to 30 days preceding the date of first accusation. Appellee cites the case of *State v. Kenstler,* 184 N.W. 259 (S.D.). Reading this case the court will find that judgment of conviction of assault was reversed because the trial court had not permitted the defendant to show hostility for a period of two years preceding the assault.

To justify the striking of the testimony of the witnesses to the bad character of the prosecutrix, appellee relies on the case of *Shewitz v. U.S.,* 293 F. 581 (CCA 6th, Br. 40). Reading the decision this court will find that the facts are entirely dissimilar from those found here. In that case the character witness stated on several occasions that he didn't know anything about defendant's reputation. This is not the case here.

To justify his repeated attempts to introduce testimony of a collateral crime on the part of the appellant,

appellee relies on the case of *Coulson v. U.S.*, 51 F.(2d) 178 (CCA 10th) (Br. 45). However, a reading of this case discloses that judgment of conviction was reversed on the precise ground that the prosecutor had introduced evidence of a collateral crime. It should be clear that the inference of guilt to be deduced from a collateral unrelated crime is relatively slight. The unfairness to the defendant is manifest because he must defend against accusations when he is unprepared to do so. In addition the prejudicial effect upon the jury far outweighs the probative value of such testimony.

Appellee argues (Br. 46): ". . . The defendant was no more prejudiced by these abortive attempts to introduce evidence than Loretta Lindsey was by the introduction of improper reputation evidence." Appellant is not aware that Loretta Lindsey was on trial for any crime. Perhaps this fact explains the absurdity of this argument.

Finally appellee attempts to demonstrate that the trial court's repeated comments to the effect that the retraction of the prosecutrix was the result of implied coercion was not prejudicial because the trial court was careful to point out that actual coercion had not been used to obtain the retraction. Appellant submits that the prejudicial effect upon him was equally disastrous as if the court had stated that the document was the result of actual coercion. The retraction, of course, constituted the central point of defense because it destroyed the credibility of the prosecutrix. The repeated unwarranted comments of the court that he considered the retraction the result of "implied coercion" necessarily destroyed the full effect of the impeachment.

CONCLUSION

Appellee has failed to adduce any authority supporting its position that a sodium pentothal interview is a reliable scientific tool to elicit "truth." It has further failed to show any precedent which would justify permitting a psychiatrist to render an opinion as to the truth or falsity of a particular story told by a witness who had been thoroughly impeached. It has failed to show any precedent permitting the verbatim reproduction of a sodium pentothal interview as a prior consistent statement or pursuant to any other theory of the law of evidence.

The requirement of corroboration in instances where the testimony of the prosecutrix has been impeached is reasonable. In the absence of an Alaska ruling on this point this court should follow the federal rule announced in the case of *Kidwell v. United States,* 38 App. D.C. 566. The trial court was incorrect in striking of the testimony of the bad reputation of the prosecutrix for truth and veracity. In the instant case the credibility of the prosecutrix was the crux of defendant's case and the striking of this testimony was highly prejudicial to appellant.

The repeated attempts of the District Attorney to bring before the jury by innuendo evidence of the commission of a collateral unrelated crime were highly prejudicial to appellant. The comments of the trial court intimating that the retraction signed and sworn to by the prosecutrix was the result of "implied coercion" was highly prejudicial to appellant.

Every one of the errors complained of singly would

warrant the granting of a new trial to appellant. The cumulative effect of all of the errors, it is submitted, makes it mandatory that appellant have a new trial.

Respectfully submitted,

PHILIP W. SCHOEL,
Attorney for Appellant.

MAX R. NICOLAI,
Of Counsel.

APPENDIX A

TRUTH SERUM

JOHN M. MACDONALD

John M. MacDonald, M.D., is Assistant Medical Director of the Colorado Psychopathic Hospital, University of Colorado Medical Center, Denver. This article is based upon experience he has gained as a state-employed psychiatrist and as a consulting psychiatrist to the District Courts of Colorado, and represents a comprehensive analysis of the value of truth serum in criminal investigation.—Editor.

Much publicity has been given to the use of drugs in obtaining confessions from suspected criminals. The terms "truth serum" suggests the existence of a drug with the remarkable property of eliciting the truth. *The reputation enjoyed by truth serum is based on spectacular newspaper reports rather than on carefully documented case reports in professional medical or legal journals.* The test is sometimes used by law enforcement officers, but it is doubtful whether it is as useful as popular belief would suggest. The description truth serum is misleading as the drug used is not a serum, and it does not always lead to the truth. Formerly scopalamine was used, but today a barbiturate drug, such as sodium amytal, is usually employed. The test may not be performed unless the suspect willingly gives his consent. The drug is injected slowly into a vein in order to induce a relaxed state of mind in which the suspect becomes more talkative and has less emotional control. *The mental state produced is not unlike that seen in acute alcoholism.*

It is well known that a person under the influence of alcohol may reveal information which he would not disclose when sober. Barbiturates are preferable to alcohol because results are obtained in a shorter time, under more uniform conditions which are easier to control and which are more conducive to satisfactory interrogation. *The intravenous injection of a drug by a physician in a hospital may appear more scientific than the drinking of large amounts of bourbon in a tavern, but the end results displayed in the subject's speech may be no more reliable.* The drugged person may be just as boastful and untruthful as the alcoholic. The risk of self-incrimination is a potent force motivating the suspect against revealing information which might lead to his conviction on a criminal charge. It is unlikely that he will reveal information under drugs unless he is prepared to do so. *The test is by no means reliable,* and when used indiscriminately, it may cloud rather than clarify criminal investigation. It is important to be familiar with the limitations of this technique which is variously called truth serum test, narcosis, and narcoanalysis. The value of the test will be considered in regard to the innocent suspect, the guilty suspect, and the suspect who claims loss of memory.

The Innocent Suspect

It might be thought that no problems would arise from the use of drugs on persons who are, in fact, innocent. Unfortunately, persons under the influence of drugs are *very suggestible* and may confess to crimes which they have not committed. *False or misleading answers may be given, especially when questions are improperly phrased.* For example, if the police officer

asserted in a confident tone "You did steal the money, didn't you?", a suggestible suspect might easily give a false affirmative answer. Gerson and Victoroff reported the case of a soldier who, under sodium amytal narcoanalysis, confessed to a robbery in which he had not participated. In 1928 in Hawaii, a murder suspect under the influence of drugs falsely confessed to writing the ransom note, but later the real murderer was discovered. False confessions under drugs may lead to a miscarriage of justice. A false confession may also interrupt the criminal investigation at a crucial time and enable the real criminal to escape detection. The test has been recommended as a valuable method of exonerating the innocent suspect, but the test is not sufficiently reliable for this purpose.

The Guilty Suspect

A confession made under the influence of drugs is inadmissible in evidence because of the rule against involuntary confessions. A confession obtained in this manner, however, may help the police to obtain further evidence which might lead to the criminal's conviction.

Occasionally, the mere suggestion of a truth serum test is sufficient to induce a confession. Some guilty suspects confess while under the influence of drugs. These confessions might appear to favor the use of truth serum tests. Experience shows that the criminal who confesses as the result of skillful interrogation without the use of drugs is the criminal who is likely to respond to examination while under narcosis. It should be emphasized that skillful interrogation requires considerable patience, effort, and psychological insight. The basis of competent criminal interrogation has been

well described by Inbau and Reid, who point out that a prime requisite for successful interrogation is persistence.

> Never conclude an interrogation at the time when you feel discouraged and ready to give up, but continue for a little while longer—if only for five or ten minutes. The writers have observed many instances where the subject's resistance broke just at the very time when the interrogator himself was about ready to abandon his efforts.

Truth serum has been recommended as a means of last resort when other methods have failed. But one wonders how many successful truth serum tests have been employed, when the interrogator has become discouraged, just at that time when the suspect was about to confess. Inbau, who has had considerable experience in observing or participating in truth serum tests, is of the opinion that such tests are occasionally effective on persons who would have previously disclosed the truth anyway if they had been properly interrogated.

The suspect who is able to withstand competent and prolonged interrogation is usually able to withstand interrogation under narcosis. The confident criminal relishes the prospect of examination under drugs. He welcomes the opportunity of making self-serving statements in the pseudo-scientific atmosphere of the truth serum test. The only person likely to gain in these circumstances is the criminal who may strengthen the effectiveness of his denials in the eyes of a credulous jury. Some law enforcement officers have a mistaken faith in the reliability of the truth serum test. As a result, they may neglect to pursue their inquiries on a

suspect who emerges unscathed from this unreliable test of truth.

The Suspect Who Claims Loss of Memory

It is not infrequent for criminal suspects to claim loss of memory for the period during which the crime was committed. This amnesia is rarely genuine, and it is important to detect malingering. Genuine amnesia may result from insanity, epilepsy, and head injury, or it may occur as an hysterical symptom following severe psychological stress, as in Case 2 described below. Severe emotional trauma may or may not cause amnesia in first offenders who have committed a crime by accident, or in anger, without planning and not for the purpose of financial gains. The psychopath, the repeated offender, and the offender who commits a crime for financial gain is much less likely to have a genuine amnesia. The person who suffers from a genuine amnesia is unable to recall any events over a circumscribed period of time. The malingerer may show this pattern, but often he has a patchy amnesia which differs from genuine amnesia. A patchy amnesia is one in which remembered and forgotten events follow each other indiscriminately. An assumed amnesia is often exposed by some chance remark or written statement of the accused. Narcoanalysis is not likely to be of value and should not be employed in cases of malingering.

The person who fakes amnesia is usually able to continue the deception under narcosis, although he may choose to simulate a return of memory. Narcoanalysis provides suspects with a welcome and apparently honorable excuse for divulging, without "loss of face,"

what they claim to have forgotten. The skilled interrogator should be able to provide such a setting for confessions without resorting to the use of drugs. A criminal may choose to simulate a recovery of memory under drugs in order to form a basis for a plea of insanity. Thus, the test may help the criminal to circumvent justice. The following is a case in point:

Case 1. A twenty-nine-year-old white man was arrested in Denver while in possession of a stolen car. The trunk of the car was bloodstained and had an unpleasant odor of decomposing flesh. The owner of the car had been missing from his home in California for some weeks, and it was suspected that he had been murdered. The suspect claimed amnesia from the time he escaped from a California mental hospital two months previously until he found himself in a Denver hospital for treatment of a bullet wound received while trying to escape from the police.

He made several untruthful statements to the police. Prolonged questioning failed to reveal any significant information, although the detective captain thought that he was on the verge of making a statement. At this stage, he agreed to narcoanalysis. While under narcosis, he described his escape from the hospital and his subsequent meeting with the missing man. One evening he left this man in the car while he went to buy some food. On his return, he discovered the owner of the car with his head "bashed in." He was frightened that he would be blamed, as he had a criminal record. He drove to an isolated spot in New Mexico where he buried the body, which was later found in the location he he had described. He displayed little emotion and no remorse as he described these events. Indeed, he

was very self-possessed and appeared almost to enjoy the examination. In view of his previous untruthfulness and his behavior while under narcosis, it was considered that he was not suffering from a genuine amnesia. He later confessed to the crime and entered a plea of insanity which was subsequently rejected by the jury.

It is not considered that the use of drugs on this criminal served any useful purpose apart from extracting some information, partly true, partly false, which would probably have been obtained within a short time without drugs.

Narcoanalysis is of value in resolving a genuine loss of memory, as, for example, in the following case:

Case 2. A thirty-year-old white man was discovered in his apartment unconscious with knife wounds in his throat and abdomen. His wife had been murdered, death resulting from a cut throat. When the husband regained consciousness, he informed detectives that he could not remember anything that happened following an argument with his wife. He believed that someone must have wounded him and murdered his wife. Under sodium amytal, he recalled telling his wife that he was going to divorce her and obtain custody of the children, as she was neglecting them. His wife shouted that the boy was not his, but his brother's child, and the dispute became very heated. Suddenly his wife picked up a knife and stabbed him several times in the chest and abdomen. In the struggle, he obtained the knife and attacked his wife. He recalled thinking that he was mortally wounded and that his wife would probably escape punishment for his death. He decided to cut his own throat as he was in severe pain and as he

thought that he was dying anyway. The story was told with considerable release of emotion. Following the interview, the amnesia returned. The opinion that this suspect was suffering from a genuine amnesia was based on his behavior under narcosis and on the total psychiatric examination.

Conclusions

Truth serum has been overrated as an aid to criminal investigation. The criminal who is likely to confess under sodium amytal is likely to confess anyway if skillfully interrogated. The criminal who is able to withstand skilled interrogation is usually able to withstand examination while under the influence of drugs. The temptation to request a truth serum test as a short cut to the solution of a crime should be avoided. There is the danger in such a practice that narcoanalysis may be substituted for the painstaking, time-consuming inquiries which form the basis of competent police investigation. As Sir James Stephen stated in 1883, referring to a practice of police officers in India, "It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."

The test is of value in restoring memory in cases of genuine amnesia. *As a test of truth, drug-induced examinations are unreliable* and should not be used for the purpose of exonerating the innocent. Criminal suspects, while under the influence of drugs, *may deliberately withhold information, persist in giving untruthful answers,* or falsely confess to crimes they have not committed.